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No. 88-94

In The Supreme Court of the United States
October Term, 1988

Kentucky West Virginia Gas Company and
Equitable Gas Company, A Division of
Equitable Resources, Inc., Petitioners

v.

Pennsylvania Public Utility Commission and
Pennsylvania Office of Consumer Advocate,
et al.,
Respondents

Brief of Respondent Pennsylvania Office of Consumer Advocate in Opposition to Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at Docket No. 87-5052

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September 30, 1988

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QUESTIONS PRESENTED

1. Where the Petitioners failed to demonstrate in the district court below that a state ratemaking disallowance of imprudently incurred natural gas costs involved unavoidable federally approved "minimum bill" obligations, did the court of appeals err in determining that such a disallowance did not violate the supremacy clause of the United States Constitution?

2. Where a state statute codified longstanding public utility principles permitting the review and disallowance of imprudently incurred costs, did the court of appeals err in determining that the application of that statute did not result in an unconstitutional taking of the Petitioners' property without just compensation?

3. Where a state regulatory authority directed a gas distribution company to retain counsel which is independent of the counsel for the company's affiliated pipeline supplier, but did not otherwise restrict the company's choice of counsel or the positions to be taken by such counsel, did the court of appeals err in determining that such order did not violate Petitioners' due process or first amendment rights?

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No. 88-94

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

KENTUCKY WEST VIRGINIA GAS COMPANY AND EQUITABLE GAS COMPANY, A DIVISION OF EQUITABLE RESOURCES, INC., PETITIONERS

V.

PENNSYLVANIA PUBLIC UTILITY COMMISSION AND PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE, *ET AL.*,
RESPONDENTS

BRIEF OF RESPONDENT PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT DOCKET NO. 87-5052

Respondent, Pennsylvania Office of Consumer Advocate ("OCA"), which is authorized by the laws of the Commonwealth of Pennsylvania to represent the interests of Pennsylvania utility consumers, Pa. Stat. Ann. Tit. 71, § 309-4(a) (Purdon 1988), submits this Brief In Opposition To The Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit At No. 87-5052. The OCA submits that the Petition should be denied as it raises no "special and important" reasons which would justify review by this Honorable Court.

STATEMENT OF THE CASE

The OCA adopts the Counter-Statement of the Case set forth by the Pennsylvania Public Utility Commission ("PUC") in its Brief in Opposition to the Petition for a Writ of Certiorari in this case.

The OCA rejects as incomplete or inaccurate certain contentions in the Statement of the Case submitted by the Petitioners, Kentucky West Virginia Gas Company and the Equitable Gas Company (hereinafter referred to jointly as "Kentucky West" or "Petitioners," unless a distinction is drawn between the two companies).

Most importantly, Kentucky West states at page 7 of its Petition — and indeed bases its entire Petition on the assertion that — *"even if Equitable had purchased gas from another supplier, the FERC-approved tariff required it to pay Kentucky West's minimum bill."* (Emphasis in the original). It is this very assertion of fact which the court of appeals found to have been completely unproven by Kentucky West in the district court below. App., *infra* p. 21a.

Moreover, Kentucky West's statement omits any reference to its opportunity to avoid its "minimum bill" payments by taking deliveries of such volumes at a later time pursuant to a FERC approved Settlement Order. *Kentucky West Virginia Gas Co.*, 33 F.E.R.C. ¶ 61,240 (November 15, 1985). While Kentucky West admits in its Statement that it invoked a *force majeure* defense to avoid the payment of certain minimum bill charges, it fails to add that, as the court of appeals has confirmed, it actually paid no such minimum bill charges during the period at issue. Petition at 6 n.6; App., *infra* p. 35a. Thus, Kentucky West's statement that the FERC tariff "required it to pay the minimum bill" does not consider its own *force majeure* defense and its failure to make such payments during the

period at issue. Nor does the Statement take into account the subsequent FERC Settlement Order which revised retrospectively Equitable's obligations pursuant to the Kentucky West tarriff.

The Statement also fails to mention a subsequent Order of the PUC which ultimately allowed Equitable to recover $2,552,833 in minimum bill obligations. *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, Docket No. R-870589, 87 P.U.R.4th 131, 136-39 (August 31, 1987). This $2.5 million minimum bill award represented all of Equitable's minimum bill claim asserted in that case.

Kentucky West's statement also does not completely review the decisions of the district court and the court of appeals on the minimum bill issue. Petition at 8-9. The district court found that the Kentucky West tariff contained a "minimum commodity" bill but decided that, given the presentation of the facts in the case, Equitable was not bound to incur the $14.3 million of gas costs at issue under the terms of the "minimum commodity bill." App., *infra* p. 45a, 53a, 54a. The court of appeals similarly found that Kentucky West had not presented sufficient facts to prove its minimum bill case. App., *infra* p. 21a, 35a, 36a.

The OCA submits that the fundamental factual premise upon which the present Petition is based was not proven by Kentucky West at trial and is, indeed, an incomplete portrayal of the actual events as they transpired in this case.

REASONS FOR DENYING THE PETITION

A. Standards For Certiorari

Supreme Court Rule 17, like Rule 19, the rule it superceded, gives this Court complete discretion in deciding whether to grant or deny a petition for a writ of certiorari. Under Supreme Court Rule 17.1, further review on certiorari is available only where the Court determines that "there are special and important reasons" for granting the petition. Sup. Ct. R. 17.1.

In the Petition for a Writ of Certiorari now before this Court, Kentucky West presents three "reasons for granting the petition." Each of the "reasons" alleges that the court of appeals decision below improperly decided specific questions of constitutional law. As discussed below, Kentucky West has mischaracterized or exaggerated the significance of the issues decided below. When the true issues of the case are seen in a focused perspective, no "special and important reasons" exist for granting the instant Petition for a Writ of Certiorari.

B. This Court Should Not Grant Certiorari As The Facts Presented Indicate That The Filed Rate Doctrine Has Not Been Violated.

1. Kentucky West Has Failed To Develop Upon The Record At Trial The Facts Necessary To Review Its "Minimum Bill" Claim.

In Kentucky West's Petition, it seeks to invoke the authority of this Court to overturn the decision of the court of appeals based upon the "minimum bill" argument which the

court of appeals has ruled Kentucky West "failed to advance...for recovery at trial."[1] Petition at 14-15; App., *infra* p. 23a. Indeed, Kentucky West has abandoned the broad range of constitutional issues which addressed the PUC's "core authority" to review Equitable's gas purchasing policies in favor of this one specific claim. App., *infra* p. 3a, 20a; Petition at 9, 11 n. 11. As the "minimum bill" issue was not properly raised before the district court, this Court should not exercise its discretion to grant a writ of certiorari to consider Kentucky West's contention.[2]

The court of appeals specifically reviewed Kentucky West's failure to raise this issue and stated:

> In conformity with our power of plenary review, we undertook a time-consuming analysis of the proceedings below to ascertain whether Equitable had raised the question of its minimum bill obligation in the context now developed on appeal. We conclude that Equitable failed to provide an analytic framework supporting an argument that the $14.3 million disallowance represented an unavoidable FERC-approved contractual obligation. The record simply does not demonstrate that any portion of the disallowed

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[1]Kentucky West argues in a footnote that the FERC has also supported its minimum bill argument in FERC's brief submitted to the court of appeals. Petition at 16 n.14. However, Kentucky West fails to indicate that FERC took no position as to whether a minimum bill issue was implicated in this litigation as it declined to take any "position on the factual basis for that claim...." FERC C.A. Brief at 45, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 837 F.2d 600 (3rd Cir. 1988).

[2]Kentucky West attempts to explain its failure to quantify at trial its minimum bill liability related to the purchases disallowed by stating in a footnote "Of course, Equitable was not seeking relief with respect to its minimum bill obligation generally, but only with respect to the cost of federally required purchases actually made and paid for."

(Footnote continued on following page)

costs represented Equitable's minimum bill obligation.

* * * *

. . .no minimum bill payments had ever been made to Kentucky West by Equitable, and the likelihood that such payments would ever be made was too speculative and uncertain to justify inclusion of them in Equitable's estimated cost of service. Those findings were unchallenged before the district court, and the first finding above was affirmed by the Pennsylvania Commonwealth Court. Therefore, this record cannot support an inference that the costs were unavoidable.

App., *infra* p. 21a, 35a-36a.

Despite this ruling by the court of appeals, Kentucky

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Petition at 18 n. 16. This statement fails to recognize that Kentucky West had the same opportunity to assert the "minimum bill" defense at trial that it later asserted before the court of appeals. This attempted explanation highlights the fact that Kentucky West has revised its litigation strategy and presented in its certiorari petition an issue not advanced at trial.

Equitable did not demonstrate at trial that it had incurred any Kentucky West "minimum bill" payments because it mischaracterized its "minimum bill" tariff obligation in the district court. Its Complaint stated: "These [FERC approved pipeline gas supply] contracts also include 'minimum bill' provisions which require Equitable to purchase a minimum specified percentage of its total contractual entitlement." C.A. App. at 16. This misstatement also appears in the Petition for Certiorari where Kentucky West states "the PUC's opinion never mentions the fact that the disallowed costs were incurred in satisfying a FERC-imposed duty to purchase gas from Kentucky West and pay the tariff rate for that gas." Petition at 17. The district court held that, while a minimum commodity bill may require *payment* for gas not taken, it "does not require Equitable to physically take the gas paid for." App., *infra* p. 45a. The associated argument that the "minimum bill" provision required payment even if no gas was taken was not further developed at trial.

West has converted its minimum bill argument into the central premise upon which its Petition is based. That is, Kentucky West first asks this Court to *assume* that the costs at issue here were unavoidable minimum bill obligations and then asserts that such a disallowance violated the "filed rate" doctrine. Even if this Court were to agree that such an issue would be worthy of review if properly presented, the issue should not be reviewed *in this proceeding* given Kentucky West's failure to properly raise the issue below.

The court of appeals acted well within its authority in declining to consider issues not properly advanced in the trial court. Where a party deliberately chooses to limit its factual presentation at trial to a particular issue in an effort to declare a state statute unconstitutional, that party is bound by the choices made and this Court will not consider other issues. *Brown v. Thomson,* 462 U.S. 835, 846 n. 9 (1983). *See also, Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

Adherence to such a rule is particularly appropriate here, considering the complex minimum bill issue now asserted by Kentucky West. The effect of the minimum bill must be considered in light of the FERC approved Settlement Order of November 13, 1985 which modified Equitable's minimum bill obligation for the July 1, 1983 to July 31, 1984 time period. *See Kentucky West Virginia Gas Co.,* 33 F.E.R.C. ¶ 61,240 (1985). The Settlement Order also permitted Equitable to avoid in part its minimum bill payments for gas not taken during this period if later deliveries were taken during the January 1, 1985 through December 31, 1988 period. *Id.* at 61,498. Kentucky West did not provide evidence below to explain the actual effect of the minimum bill provisions and the November 1985 Settlement Order upon the PUC gas cost disallowance even though extensive trial proceedings oc-

curred in August 1986. C.A. App. at 344-902. Any belated excursion into fact finding before this Court is particularly inappropriate.

2. The Findings Of Fact Determined Below Do Not Support A Contention That The Filed Rate Doctrine Has Been Violated.

This Court has declared that it will exercise only limited appellate review when considering findings of fact. In this case, the district court found that the PUC had not disallowed any FERC approved costs which Equitable was required to pay to Kentucky West under the terms of its tariff. App., *infra* p. 53a-54a, 59a-60a. The court of appeals concurred, and found that there was no basis to assume the existence of any such "unavoidable" costs. App., *infra* p. 35a-36a. Thus, unless this Court wishes to engage in an independent fact finding mission, it is inappropriate to grant certiorari here.

This Court has determined that the findings of fact of a court of appeals shall not be reversed upon review by this Court. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275, 93 L.Ed. 672, 69 S.Ct. 535 (1949) [citation omitted]." *See also, Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2623 (1987); *Rudolph v. United States*, 370 U.S. 269, 270 (1962). Based upon the findings of fact made by the district court and court of appeals in the present case, *i.e.*, that there were no FERC approved costs that Equitable was bound to incur under the Kentucky West "filed rate," Kentucky West's minimum bill allegation dissolves for a lack of factual support.

Any remaining support for Kentucky West's claim is eroded by a later Order which granted to Equitable certain of its claimed minimum bill costs. In *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, Docket No. R-870589, 87 P.U.R.4th 131, 138-39 (August 31, 1987), the PUC reviewed Equitable's minimum bill obligation in light of the FERC Settlement Order noted above. The PUC awarded Equitable an additional $2.5 million and found:

> The $2.5 million claimed in the instant proceeding is consistent with the FERC approved settlement, which permitted Kentucky West to waive the minimum commodity bill for the period involved in our 1985 Order.
>
> * * *
>
> Therefore, we will permit Equitable to include in rates that fixed cost portion of these gas volumes below minimum bill. This is consistent with our understanding of the operation of FERC approved minimum bills.

Id. at 139. No appeal was taken from this Order.

This Court has determined that the findings of administrative agencies should be given the same effect as such findings are given by state courts. *University of Tennessee v. Elliott*, 478 U.S. 788, 795 (1986). The court of appeals properly applied that doctrine in this case to give preclusive effect to the factual findings made in the 1985 PUC proceeding here at issue.[3] App., *infra* p. 22a. Apply-

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[3]Kentucky West asserts that the court of appeals "allows state regulators to immunize their prudence determinations from scrutiny by making the 'factual' finding that a FERC-approved tariff is not relevant...." in assessing the impact of a FERC rate. Petition at 18. Ken-

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ing this same doctrine to the PUC's holding in the 1987 proceeding, which awarded Equitable $2.5 million in minimum bill costs, conclusively establishes that Equitable has been made whole with regard to its minimum bill costs.[4] Accordingly, this Court should accept the findings of fact below and rule, pursuant to Supreme Court Rule 17.1, that no controversy exists worthy of further review.

Given Kentucky West's failure to support its minimum bill claim in the trial court below, this Court cannot apply with any certainty the constitutional doctrines set forth in other cases involving FERC established rates such as *Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428 (1988) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). Even if an important constitutional issue is implicated by a petitioner's allegations, "where the record is not sufficiently clear and specific" to decide the constitutional issue, the Court must decline to engage in such appellate review. *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968). Accordingly, the facts of this case or, in the words of the court of appeals, "the absence of facts indicating that the specifics of this minimum bill obligation issue were properly presented to and adjudicated before the district court," creates an infirm founda-

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tucky West, however, misconstrues the court of appeals' finding. The court of appeals accepted the PUC finding of fact that Equitable had made no minimum bill payments to Kentucky West as a result of its *force majeure* defense and continued settlement discussions to determine "what minimum bill costs, if any, would *ever* be incurred by Equitable...." App., *infra* p. 21a. The court of appeals then considered this factual finding and determined, as a matter of law, that Equitable had no right to recover minimum bill costs not actually paid while settlement talks continued. App., *infra* p. 35a. Thus, the court of appeals accepted the PUC's determination only as a finding of fact and applied its own legal analysis to approve the PUC's conclusion.

[4]In a subsequent PUC proceeding, *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, R-880932 (September 1, 1988), Equitable has sought an *additional* $10.2 million in costs which it

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tion for the construction of any rule of constitutional law. App., *infra* p. 19a.

In *Mississippi* and *Nantahala*, this Court found that the obligation to pay the "trapped costs" under the FERC approved tariff was clear. In *Nantahala*, 476 U.S. 953 (1986), this Court concluded that the FERC Order at issue determined the amount of low cost power which Nantahala could obtain. *Id.* at 967. Similarly, in *Mississippi*, 108 S. Ct. 2428 (1988), FERC established the cost which Mississippi Power and Light was to pay to its power supplier. *Id.* at 2440. In *Mississippi*, this Court also acknowledged, however, that a refusal to pass through all wholesale costs might be permitted if the utility purchased "unnecessary quantities of high cost power, even at FERC approved rates, if it had the legal right to refuse to buy that power." *Id.; See also Nantahala*, 476 U.S. at 972 (citing *Pike County Light & Power v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983)).

The Pennsylvania Commonwealth Court clarified this exception to the "filed rate" doctrine in *Pike County* as follows:

> The FERC focuses on Orange & Rockland to determine whether it is just and reasonable *for that company* to charge a particular rate, but makes no determination whether it is just and reasonable *for Pike to incur* such a rate as an expense.

* * *

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claims would have been due to Kentucky West if it had not taken the gas which is the subject of the 1985 gas cost disallowance. By Order entered September 1, 1988, the Commission rejected this claim on the ground that this "variable" portion of Equitable's minimum bill obligation was waived under the FERC Settlement Order noted above and that such obligation was never actually incurred. Slip Opinion at 5-13.

> The PUC focuses on Pike...to determine whether it is reasonable for Pike to incur such costs in light of available alternatives.

Id. at 274-75, 465 A.2d at 738 (emphasis in the original). The court of appeals held that Kentucky West failed to prove the existence of any unavoidable "trapped costs." App., *infra* p. 14a-23a. The disallowance of excessive gas costs in this case falls clearly within the *Pike County* exception to the filed rate doctrine which was implicitly recognized in *Mississippi,* 108 S. Ct. 2428 (1988), and *Nantahala,* 476 U.S. 967 (1986). Thus, no review by this Court pursuant to Supreme Court Rule 17.1(c) is required.

Moreover, this Court's recent discussions and applications of the filed rate doctrine in *Nantahala* and *Mississippi* do not require restatement here. This Court has explained the filed rate doctrine comprehensively in both of those cases. The factual limitations and ambiguities evident in this case do not present a reasonable opportunity for fruitful reexamination of the filed rate doctrine. Thus, the *Nantahala* and *Mississippi* cases do not require or support the need for further appellate review as the facts presented in this case do not establish that any violation of the filed rate doctrine has occurred.

3. The Filed Rate Argument In This Case Has Lost Importance Given FERC's Recent Policy Of Eliminating Minimum Bills From Pipeline Tariffs.

As indicated above, the gravamen of Kentucky West's Petition concerning the "filed rate" doctrine is dependent upon a finding that the Kentucky West tariff compelled Equitable to incur minimum bill costs related to all Kentucky West gas not taken. The importance of this issue has been diminished substantially by FERC's June 22, 1988 Order eliminating Kentucky West's minimum bill from the tariff under which Equitable takes service. The Kentucky

West minimum bill was eliminated retroactively as of March 2, 1986. *Kentucky West Virginia Gas Co.*, 43 F.E.R.C. ¶ 61,496, 62,228 (June 22, 1988). Request for Rehearing granted solely for the purpose of further consideration, *Id.* at Docket RP86-52-010, *et al.*, Order issued August 19, 1988.

The FERC has also, as a matter of general policy, eliminated minimum bills with regard to other major gas pipelines. In *Texas Eastern Transmission Corp.*, 43 F.E.R.C. ¶ 61,076 (April 19, 1988), it was noted that the FERC had eliminated minimum bills from a number of major gas pipeline tariffs in recent years.[6] Thus, the importance of minimum bill provisions upon the filed rate doctrine has diminished not only for Kentucky West but for the gas pipeline industry as a whole.

This Court has held that a writ of certiorari should be dismissed if circumstances have changed such that the issue presented is "intellectually interesting" but subsequent events have reduced its "importance to the public." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 79 (1955) (quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). Minimum bill provisions have now been almost entirely extinguished from FERC pipeline tariffs in the interest of fostering competition between pipelines. *Texas Eastern*, 43 F.E.R.C. at 61,237 and *Kentucky West*, 43 F.E.R.C. at 62,225. Even if this Court concludes that the minimum bill provisions of the Kentucky West tariff have raised a "filed rate" issue in this case, it is submitted that such an issue is now only of

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[6] *Id.* at 61,238 n.17 (citing *Transcontinental Gas Pipe Line Corp.*, 37 F.E.R.C. ¶ 61,328, Opinion No. 260 (1986); *ANR Pipeline Co.*, 37 F.E.R.C. ¶ 61,263, Opinion No. 258 (1986), reh'g denied, 38 F.E.R.C. ¶ 61,221, Opinion No. 258-A (1987); *Tennessee Gas Pipeline Co.*, 36 F.E.R.C. ¶ 61,071 (1986); and *Transwestern Pipeline Co.*, 32 F.E.R.C. ¶ 61,009, Opinion No. 238 (1985), reh'g denied, 36 F.E.R.C. ¶ 61,175, Opinion No. 238-A (1986)).

historical interest given FERC's recent policy of eliminating minimum bill provisions from pipeline tariffs. Thus, the "filed rate" issue which Equitable has attempted to present fails to raise an issue of continuing public importance appropriate for granting a writ of certiorari.

C. The PUC's Disallowance Of Imprudently Incurred Energy Costs Was Not Confiscatory.

1. The PUC Exercised Its Authority To Disallow Imprudent Energy Costs Prior To The Enactment Of Act 74.

The second of Kentucky West's "Reasons For Granting The Petition" is grounded in mistaken assumptions of law. Kentucky West asks this Court to consider whether the "retroactive application of a new ratemaking standard" which bars the recovery of costs they allege as "previously recoverable" constitutes a "taking of property without just compensation in violation of the Due Process Clause of the Fourteenth Amendment." Petition at I. Thus, it is Kentucky West's claim that Act 74 was a "new ratemaking standard" which, when applied to the gas purchases in question, violated the Constitution. Petition at 20.

The OCA submits that the underlying authority of the PUC to review the prudency of a public utility's energy cost rests not in the enactment of Act 74, but rather in the Commission's general authority, and corresponding obligation, to establish "just and reasonable rates." 66 Pa. Cons. Stat. § 1301 (1988). This authority existed long before Act 74 was enacted, and is essential in order for a state utility commission to determine fair utility rates. Such regulatory treatment has long been applied

by state commissions.[6] Accordingly, Kentucky West's claim concerning the "retroactive" application of Act 74 rests on a fundamentally ill-conceived notion of preexisting public utility law.

As explained by the Commission in the Order which gave rise to this proceeding, Act 74 established a specific statutory standard and procedural basis by which the recovery of gas costs could be judged. While the statute was enacted after Equitable incurred the gas cost that was disallowed in the PUC decision below, the authority to disallow such costs as imprudent was not a new concept to utility law. A review of prior energy cost cases demonstrates that the PUC correctly held that it had the "authority to disallow the pass-through of excess gas costs *even before Act 74 was established.*"[7] App., *infra* p. 134a (emphasis in the original).

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[6]*See, e.g., Re Lockport Light, Heat & Power Co.*, No. 4335, 1918C P.U.R. 675, 700-03 (N.Y.P.S.C. 1918) (utility was not allowed to recover the additional cost of electricity incurred by purchasing from an affiliate instead of under an existing contract with a less expensive supplier); *Re City of Vancouver v. Pacific Power & Light*, No. 5184, 1921C P.U.R. 527, 532-33 (P.S.C. Wash. 1921) (utility allowed to recover costs of purchasing gas from an affiliate where that gas was less expensive than available alternatives); *Re Village of Pardeeville v. Pardeeville Electric Light Co.*, No. 2-U-285, 10 P.U.R. (N.S.) 267, 269-71 (Wis. P.S.C. 1935) (utility not allowed to recover the costs of generating its own power where it would have been less expensive to purchase all of its requirements from an outside supplier); and, more recently, *Re Bozrah Light & Power Co.*, No. 9850, 34 P.U.R.3d 398, 406 (Conn. P.U.C. 1960) (utility reasonably purchased power through a middleman because it would have been more expensive to purchase energy directly from the supplier); and *Re Pacific Lighting Gas Supply Co.*, No. 43670, 44 P.U.R.3d 177, 183-86 (Cal. P.U.C. 1962) (utility imprudently chose to purchase more expensive gas from intrastate producers when cheaper, more reliable sources were available from interstate pipelines).

[7]Kentucky West also takes issue with the court of appeals' rejection of their retroactivity claim on the basis that the court of appeals found incorrectly that Equitable "voluntarily" chose the retroactive re-

(Footnote continued on next page)

Equitable raised the same ground for relief in a related case before the Commonwealth Court of Pennsylvania, which is the Pennsylvania intermediate court that hears all appeals of PUC Orders. The claim was unanimously rejected. *Equitable Gas Co. v. Pennsylvania Public Utility Commission*, 106 Pa. Commw. 240, 526 A.2d 823 (1987). The Commonwealth Court interpreted the authority of the PUC to review and disallow gas costs retrospectively as follows:

> [T]here was no retroactive application of Act 74 by the PUC because, prior to the enactment of Act 74, the PUC had the authority to retroactively determine the reasonableness of costs incurred in a subsequent proceeding. The authority to determine reasonableness was not limited to prospective application of Act 74 in the case at bar because the rates in issue had yet to be subject to a determination by the PUC as to their reasonableness as required by Section 1301 of the Public Utility Code.

(Footnote continued from following page)

view standard when it filed for an upward gas adjustment pursuant to 66 Pa. Cons. Stat. 1307(f) (1988). Petition at 23. The court below, however, was correct that Equitable had a legitimate choice of filing under either the Section 1307 gas cost standard or the base rate procedures under Section 1308 of the Public Utility Code. The Section 1308 proceeding sets rates prospectively, not retrospectively, based on projections of the future cost of gas. *See* 66 Pa. Cons. Stat. §§ 1308 and 1318 (1988). However, Section 1308 does not provide for the retrospective review of fuel cost recovery as provided for by Section 1307. Thus, Equitable could have elected to have its gas costs recovered through a Section 1308 proceeding prior to the 1983-1984 period here at issue which would not have been subject to the retroactive disallowance of which they now complain.

Id. at 262, 526 A.2d at 832.[8]

Moreover, the PUC asserted its authority to disallow from rates excessive gas and other energy costs well before the enactment of Act 74. For example, in *Gas Cost Rate No. 6,* M-78050055F083 (Pa. P.U.C. January 13, 1984) which was cited by the PUC in its decision below and which applied to all Pennsylvania jurisdictional gas utilities, the PUC stated:

> Until an appellate court holds that Section 1307 procedures do not permit this Commission to retroactively adjust fuel cost rates we will continue to review prior Gas Cost Rates retrospectively and comprehensively. We will exercise our power of review for the purposes of determining not only the arithmetic accuracy of the fuel costs incurred and billed, but also the reasonableness of those charges.
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> * * *
>
> We not only reserve the right, but also specifically condition the granting of approval of GCR No. 6 (or any automatic fuel cost adjustment tariff) on the ability or power of this Commission to retroactively investigate, audit and adjust the reasonableness of the rates set herein as contemplated by the express wording of subsection 1307(e)(2).

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[8]Although the decision of a lower state court is not controlling on an issue on which the highest state court has not spoken, this Court attaches significant weight to a lower state court's decision in the absence of convincing evidence that the highest state court would rule otherwise. *See Commissioner v. Estate of Bosch,* 387 U.S. 456, 464-65 (1967); *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). Thus, this Court should accept the Commonwealth Court's interpretation of Act 74 and the PUC's preexisting authority to disallow imprudently incurred fuel costs.

App., *infra* p. 134a-35a (quoting Gas Cost Rate No. 6, M-78050055F083 (Pa. P.U.C. January 13, 1984)). Indeed, the *Gas Cost Rate No. 6* Order was itself a reaffirmation of the Commission's 1978 Order which established the gas cost rate procedure and stated that:

> The application of the gas cost rate shall be subject to continuous review and to audit by the commission at such intervals as the commission shall determine. The commission shall continuously review the reasonableness and lawfulness of the amounts of the charges produced by the gas cost rate and charges included therein.

Re Gas Cost Rates, 52 Pa. P.U.C. 217, 220 (1978).

The PUC's pre-existing authority to disallow the costs at issue here is also evidenced by the holdings in *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268, 465 A.2d. 735 (1983) (affirming *Pennsylvania Public Utility Commission v. Pike County Light & Power Co.*, 56 Pa. P.U.C. 371 (1982)); *Allegheny Ludlum Steel Corp. v. Pennsylvania Public Utility Commission*, 501 Pa. 71, 459 A.2d 1218 (1983) (affirming PUC Order entered January 1, 1982); and *Metropolitan Edison Co. v. Pennsylvania Public Utility Commission*, 62 Pa. Commw. 460, 437 A.2d 76 (1981) (affirming PUC Order entered May 23, 1980).

The PUC, in *Metropolitan Edison*, 62 Pa. Commw. at 468, 437 A.2d at 81, had determined "that as a result of Met-Ed's managerial imprudence, the utility's ratepayers were forced to pay, in 1974, unjust and unreasonable rates under Met-Ed's fuel adjustment clause." The Commonwealth Court, in affirming the PUC's disallowance of those imprudent costs, rejected the utility's contention that a provision in its tariff which allowed the company to adjust its rates to reflect fuel costs "represents a 'Commission-

made rate' and thus cannot be retroactively changed" by the PUC. *Id.* at 465, 437 A.2d at 79. The Commonwealth Court reasoned that, while commission-made rates were "stamped with antecedent Commission approval" and thus "immune from retroactive alteration," the rates in question had not been subject to such prior approval by the Commission and "thus, Met-Ed could not validly expect that the surcharges in issue were insulated from retroactive modification by the Commission." *Id.*, 437 A.2d at 79-80.[9]

Most significantly, in *Pike County,* 56 Pa. P.U.C. at 373, the PUC determined in 1982 that it had the authority to consider the reasonableness of a subsidiary's power supply expenses, even though such expenses were paid pursuant to a FERC tariff over which the Commission recognized that it had no jurisdiction. The Commission's decision in *Pike County* was guided, however, by its conclusion that the FERC tariff sets the *rate* for purchasing wholesale energy, but does not prevent a utility from exercising reasonable judgment in its *choice* of purchasing among available alternative sources subject to other FERC rates. *Id.* Moreover, the Commission noted that "it is within our power to determine the reasonableness of expenses incurred by Pike." *Id.* at 372. These determinations were upheld in 1983 by the Pennsylvania Common-

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[9]*See also, Allegheny Ludlum,* 501 Pa. 71, 459 A.2d 1218 (1983), where the Supreme Court of Pennsylvania reviewed and upheld as constitutional the PUC's implementation of an energy cost rate adjustment provision of the Public Utility Code similar to the Act 74 mechanism. The Court determined that retrospective prudency review of electric power cost increases satisfied procedural due process requirements because the mechanism provided procedural "safeguards ... afforded through a subsequent, year end, automatic proceeding for final determination and adjustment of rate increases allowing full participation by all interested parties." *Id.* at 77, 459 A.2d at 1221.

wealth Court in *Pike County,* 77 Pa. Commw. 268, 465 A.2d 735 (1983).[10]

The purchases disallowed in *Pike County,* 56 Pa. P.U.C. at 373, were substantially similar to the affiliate purchases disallowed by the Commission in its decision at issue in the present case. Pike County had purchased more expensive electric power from its parent company when less expensive power was available. Act 74 clearly did not create the PUC's authority to disallow such costs, since such authority has already been exercised pursuant to the Commission's pre-existing duty to set just and reasonable rates. Thus, the Pennsylvania courts have long held that imprudently incurred energy costs are subject to an after the fact disallowance.

2. The Commission's Denial Of Gas Costs That Were Found To Be Imprudently Incurred Did Not Violate Reasonable Investor Expectations.

A state utility commission has the authority — and indeed, the duty — to disallow a utility's attempt to recover excessive, uneconomical, or imprudently incurred expenses. Kentucky West's assumptions concerning applicable state law and this Court's takings jurisprudence are fundamentally erroneous.

Kentucky West's claim that the Commission Order here violated reasonable investor expectations is thus without merit. Petition at 21. This Court has recognized that investor expectations based on inaccurate interpreta-

[10]As noted above, the *Pike County* decision was distinguished by this Court as a possible exception to the filed rate doctrine in *Nantahala,* 479 U.S. at 972. *See infra p. 11.* In addition, the court of appeals, in its decision that the district court should not have abstained from addressing the merits of this case, referenced *Pike County* when it stated that Act 74 is "in our opinion, not only clear on its face, it is also consistent with prior Pennsylvania case law on this topic." App., *infra* p. 93a.

tions of the law are not protected by the takings clause. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-10 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection"). To the extent that investors believed that Equitable had a constitutional right to recover imprudent expenses from ratepayers, they were clearly mistaken. As a matter of longstanding public utility law and particularly in light of the 1982 PUC and 1983 Commonwealth Court decisions in *Pennsylvania Public Utility Commission v. Pike County Light & Power Co.*, 56 Pa. P.U.C. 371 (1982) and *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268, 465 A.2d 735 (1983), it should have been clear to those investors that the Company's decisions to purchase expensive gas from an affiliate while lower cost gas was available from other sources, would not be immune from Commission scrutiny. Nor should those investors have been surprised when that scrutiny resulted in this partial rate disallowance.

In *Equitable*, 106 Pa. Commw. at 261, 526 A.2d at 832, the Commonwealth Court recognized the PUC's authority to disallow these costs and stated: "It is an underlying principle of public utility law that a utility may not recover costs from its ratepayers unless those costs have been determined to be just and reasonable," and that: "As these costs were found by the PUC to be excessive and imprudently incurred, and therefore unreasonable, the PUC could properly disallow the pass through of these costs to ratepayers."[11]

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[11]Kentucky West also claims that the PUC previously approved Equitable's purchasing strategy in its *Re Gas Cost Rate No. 5*, No. M-78050055, 58 P.U.R.4th 369, 375 (Pa. P.U.C. March 16, 1984) proceeding. Petition at 6. However, Kentucky West admits that this approval applied only to "the period immediately preceding that at issue here." *Id.* Moreover, the actual holding of the *GCR No. 5*

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Kentucky West's confiscation claim is, therefore, without merit as investors could have no reasonable expectation of the recovery of imprudently incurred costs.

D. The PUC's Requirement That Equitable Must Employ Separate Counsel From That Employed By Kentucky West For FERC Rate Proceedings Did Not Violate The Due Process And The First Amendment Constitutional Rights Of Equitable.

The PUC Order at issue recognized an inherent conflict presented in Equitable's participation in the Kentucky West rate cases before the FERC. Equitable and Kentucky West are affiliated companies within the corporate structure of Equitable Resources, Inc. App., *infra* p. 147a. Equitable purchases more than 70% of all gas sold by Kentucky West. *Id.* Noting this conflict, the PUC entered an Order requiring that Equitable "obtain independent representation of its interest by legal counsel and technical support staff wholly separate from Kentucky West...." App., *infra* p. 148a.

Kentucky West took issue with this aspect of the Order and sought its reversal in the district court on the

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proceeding that Kentucky West references in support of its notion of prior approval is inapposite to its claim. *Re GCR No. 5* , 58 P.U.R.4th at 369. As noted by the PUC in its decision below, App., *infra* p. 135a, it "expressly held [in *GCR No. 5*] that all fuel revenues and expenses, whether in the GCR or in base rates, are subject to review within the Commission's GCR procedures and are not Commission-made rates." *See GCR No. 5*, No. M-78050055, 58 P.U.R.4th 369, 375 (Pa. P.U.C. March 16, 1984). The Commission also noted: "[i]n addition, the issues raised by Trial Staff and the OCA here were not actually litigated in *GCR No. 5.*" App., *infra* p. 135a-36a. Thus, the prudency of Equitable's purchased gas costs and practices during the period involved here was not litigated or even considered in *GCR No. 5.*

grounds that it had been denied the right to due process and other first amendment guarantees under the U.S. Constitution. App., *infra* p. 43a n.4. The district court took no action upon this claim, ruling that it may more properly be submitted to the FERC at a later time. *Id.*

Upon Kentucky West's appeal of the district court decision, the court of appeals reviewed the Kentucky West claim, recognized the potential conflict of interest between Equitable and Kentucky West and held that the PUC Order did not contravene any principle of federal law. App., *infra* p. 36a-39a.

In its Petition, Kentucky West argues broadly that the PUC has violated its right to unrestricted choice of legal counsel and references such concepts as "fundamental fairness," "Anglo-American Legal tradition," "due process," and "First Amendment Rights." Petition at 24-26. Kentucky West seeks to expand preexisting law concerning the right to counsel in administrative proceedings into an absolute doctrine unaffected by the actual conflicts of interest evident in this case.

As the court of appeals has concluded, the right to choice of counsel is not absolute. App., *infra* p. 38a. Federal courts have recognized that important policies may restrict a litigant's choice concerning the selection of counsel. In *Federal Trade Commission v. Exxon Corp.*, 636 F.2d 1336, 1341-47 (D.C. Cir. 1980), it was held that the Federal Trade Commission acted within its authority in prohibiting an attorney-client relationship between the Exxon corporate parent and the Drives Group subsidiary, given the potential for FTC ordered divestiture of these two entities. *Exxon* indicates that the FTC Order did not inhibit Exxon's ability to continue its litigation and that a potential conflict of interest existed between Exxon and the Drives Group. *Id.* at 1342, 1345-47. Given the important policy goal of making certain that the integrity of the

Drives Group could be protected in the event that divestiture was ordered, the Court approved the FTC Order which categorically prohibited Exxon and Drives Group from sharing the same attorney. *Id.*

The right to counsel may be restricted when important policy goals require such restrictions. Notably, in this case, a clear conflict of interest between Kentucky West and Equitable was evident which provided a similar basis for the restriction on counsel selection as existed in *Exxon*. *Id.* at 1336. While Equitable and Kentucky West are entirely free to choose among the large body of lawyers qualified to represent them before the FERC, they are not permitted to employ the same attorneys in consideration of the policy of avoiding conflicts of interest as set forth above.

Kentucky West cites frequently the case of *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), in order to buttress its right to counsel argument. In *Walters*, a group of veterans sought to establish a constitutional right to attorney representation before the Veterans Administration. This right had allegedly been violated by a federal statute restricting payment to attorneys in such cases. *Id.* at 332-34. The creation of an additional constitutional right to attorney representation was flatly rejected by this Court. In *Walters*, it was found that such an unrestricted right to attorney representation did not attach to the administrative proceedings related to the securing of veterans' benefits. *Id.* at 332-35.

As the court of appeals determined in this case, this Court has not recognized an absolute constitutional right to counsel in a civil case or in a civil matter before an administrative agency. App., *infra* p. 37a-38a. The court of appeals correctly distinguished a case securing a party's right to joint counsel before an administrative agency, *i.e.*, *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966), as involving a right to the joint use of counsel where each of the parties

shared potential common liability in the case prosecuted by the administrative agency. Kentucky West and Equitable have made no contention here that they share common potential liability before the FERC. Hence, *Higashi* may be distinguished upon its facts.

Kentucky West seeks to support its right to counsel argument by exaggerating the effect of the PUC Order as follows: "In other words, the order forces Equitable to make statements, through independent counsel acting on behalf of the ratepayers, with which it does not agree." Petition at 27. While the PUC's Order compels Equitable to hire counsel "fully separate from Kentucky West," the Order does not require Equitable to make statements or take positions "with which it does not agree."

The PUC's subsequent Order in 1987 demonstrates that the PUC has not compelled Equitable to take any particular positions before the FERC. The PUC's opinion quotes with approval the Recommended Decision of the Administrative Law Judge which states that "'the Company does have the right to exercise its own management discretion'" concerning the positions advocated before FERC. *Pennsylvania Public Utility Commission v. Equitable Gas Company,* Docket No. R-870589, 87 P.U.R.4th 131, 168 (Pa. P.U.C. August 31, 1987). The PUC has not attempted to impose any particular litigation strategy or positions upon Equitable concerning its litigation before the FERC. Accordingly, Kentucky West's contention that the PUC forced it to act against its own interest in violation of its First Amendment constitutional rights is clearly incorrect.

Moreover, this entire controversy is not ripe for review. Equitable has in fact hired a second law firm to represent it in all Kentucky West proceedings. *Id.* at 164. No showing has been made upon this record that Equitable has been harmed in any manner by the use of such a second firm in Equitable's litigation with its affiliate. The

PUC has also not attempted to censor or in any manner direct Equitable to advocate positions before the FERC with which it disagrees. Thus, the issue presented is the type of "abstract disagreement" which this Court has determined would not be ripe for review. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985). The case does not present the type of conflict necessary to fully decide a constitutional issue such as the one advocated in this proceeding.

CONCLUSION

The Court of Appeals for the Third Circuit correctly determined that the PUC Order at issue did not 1) violate the "filed rate" doctrine, 2) improperly impose a new standard for the disallowance of imprudently incurred gas costs, or 3) deny to Equitable its constitutional rights by requiring Equitable to employ counsel separate from that employed by Kentucky West. The court of appeals rulings are not inconsistent with prior rulings of this Court or with the rulings of other federal courts of appeal. No important and unresolved issues of federal law are presented. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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